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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 JHOANA JUCA, et al.,

4 Plaintiffs,

5 v.

19 Cv. 9427 (ER)

6 RICHARD CARRANZA, et al.,

7 Defendants.

8 -----x

9 New York, N.Y.
October 18, 2019
2:00 p.m.

10 Before:

11 HON. EDGARDO RAMOS,

12 District Judge

13 APPEARANCES

14 BRAIN INJURY RIGHT GROUP, LTD.

15 Attorneys for Plaintiff

16 BY: PETER G. ALBERT

17 NEW YORK CITY LAW DEPARTMENT

18 BY: ANDREW J. RAUCHBERG

19 LILLIAN ESPOSITO

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(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record.

MR. ALBERT: Good afternoon, your Honor. Peter Albert, from the Brain Injury Rights Group, for the plaintiffs.

THE COURT: Good afternoon.

MR. RAUCHBERG: Good afternoon, your Honor. Andrew Rauchberg, from the New York City Law Department, on behalf of the defendants.

MS. ESPOSITO: Good afternoon, your Honor. Lillian Esposito, on behalf of the New York City Law Department.

THE COURT: Good afternoon to you both.

So this matter is on for a show cause hearing on plaintiffs' request for a preliminary injunction. I have received the parties' papers.

Mr. Albert, do you wish to be heard further?

MR. ALBERT: Briefly, your Honor.

THE COURT: You can remain seated.

MR. ALBERT: Briefly, this case -- and I will try to be brief and succinct -- it comes under the federal Individuals with Disabilities Education Act, and, specifically, Section 1415(j) of that act, which is sometimes referred to as the state court or pendency provision. And, in essence, without quoting the statute, which is pretty simple with respect to the language, is that, once a parent or a district commences an

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1 administrative due process proceeding, there is an automatic
2 injunction that's put into effect, essentially to protect the
3 student from being changed, from being moved from one
4 educational placement to another. That was the congressional
5 intent.

6 In this case, when that happened, during the
7 administrative proceedings, and I won't go through each of the
8 cases, but essentially in the cases there was almost a
9 bifurcation of the administrative process. The first part of
10 the process is to determine what the student's pendency is.
11 Where is that student right now? Where is that student
12 receiving his or her educational program? And then the second
13 piece, which follows from that, and is independent with respect
14 to standards and determination, is: What is an appropriate
15 placement, in essence, for that student? Did the school
16 district provide something appropriate? Did the parents
17 provide something that was appropriate? Where is the balance
18 of equities, etc.?

19 But with respect to the pendency issue, and again
20 1415(j), 1415(j) is somewhat unique in that although it's
21 referred to as an injunction, it's an automatic injunction, and
22 the typical standards and criteria required for an award of a
23 preliminary injunction -- likelihood of success on the merits,
24 irreparable harm -- are not needed. And there's a number of
25 cases that are cited in our papers, Second Circuit decisions,

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1 that go back to the early 1980s with respect to that issue.

2 In this particular case, this is really an enforcement
3 action. So this case is kind of after the administrative
4 hearing officers have found pendency and have ordered pendency,
5 meaning that the student will stay wherever they are and that
6 the district, in this case the DOE defendant, has to fund that
7 placement. Because the funding of the pendency placement is
8 congruent with the pendency placement itself.

9 In this case, there were six students, five of whom
10 received pendency orders or decisions, which the hearing
11 officer stated, this is your pendency placement and the DOE
12 needs to fund it. That hasn't happened, or it's happened only
13 in part. And it's not necessarily a dispute regarding the
14 facts, because in the DOE's own papers they readily admit that
15 there are funding items that have not been paid.

16 Now, the parents --

17 THE COURT: But that are being processed?

18 MR. ALBERT: They are being processed.

19 Now, the parents don't expect instantaneous payments.

20 THE COURT: That's what Mr. Ashanti was requesting.

21 MR. ALBERT: I don't think he was asking for
22 instantaneous, but certainly the automatic injunction of
23 1415(j) is immediate, it's immediate relief.

24 Now, immediate relief, clearly, a couple of days would
25 certainly be realistic. But we have had a prior case where it

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1 was months and months of parents waiting for the funding. In
2 this case, again, most of the pendency orders were issued in
3 August, early September, and payments haven't been received.

4 THE COURT: But the automatic injunction doesn't speak
5 to payment, it speaks to the actual services that the child is
6 receiving.

7 MR. ALBERT: Correct. The pendency essentially means
8 the elements, if you will, of the student's program.

9 THE COURT: Right.

10 MR. ALBERT: Class size, what kind of services the
11 student will actually get, not necessarily the location and
12 things along that. That can become an issue, but for purposes
13 of pendency in these cases, the hearing officer, the
14 administrative hearing officer, made those determinations based
15 on either papers or evidence that was submitted, or on a basis
16 of a consensus by and between the parties.

17 THE COURT: Mr. Albert, let me ask you this, because
18 the city tells me that in this case, with respect to the
19 students that are before me, with the exception of one, prior
20 to this action having started, the city told you that pendency
21 is not an issue and that payments would be made. Since this
22 matter has been filed, the city came in and said that pendency
23 is not contested and the payments are being processed, some
24 have already been made, the others we have told them when they
25 are likely to receive it. I got papers yesterday from the city

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1 telling me that most of the payments have been made, and those
2 that have not been made have begun the process of being
3 processed; and, by the way, they are asking for preliminary
4 injunction with respect to invoices that we got a day before,
5 or two days before they filed this action.

6 Is any of that inaccurate?

7 MR. ALBERT: I believe the majority is accurate. It
8 may kind of conflate some of the issues as to what is being
9 paid and what is not being paid, but it's the plaintiffs'
10 position that the DOE can't pick and choose which cases they
11 are going to pay on; they can't pick and choose the schedule
12 that they are going to make those payments. Again, I don't
13 mean to be flippant, but certainly promises promises, you know,
14 that's not going to cut it. These are administrative orders by
15 hearing officers that said, You, DOE, must do X.

16 THE COURT: And they are telling me that they are
17 doing it. But let me ask you this. I see that you are an
18 attorney with the Brain Injury Rights Group.

19 MR. ALBERT: Correct.

20 THE COURT: I take it you do this type of work as part
21 of your --

22 MR. ALBERT: I also serve as an impartial hearing
23 officer.

24 THE COURT: OK.

25 MR. ALBERT: So I have been doing this, I want to say

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1 more years than I want to publicly admit, but probably 20 to 25
2 years.

3 THE COURT: Then you know a lot more about this than I
4 do. So let me ask you this. Is the city treating iBRAIN
5 differently than it is treating any other provider of special
6 education services?

7 MR. ALBERT: I can't speak on behalf of DOE, but I
8 suspect there may be some foot dragging on the part of DOE.
9 One of the exhibits that we have submitted is that the DOE has,
10 I don't know if it's an unwritten policy or written policy with
11 respect to what they require for these kinds of payouts. If
12 you examine New York State Education Law, if you examine the
13 IDEA, there is no such requirements. In essence, they are
14 almost granting themselves a stay from these orders, that once
15 the impartial hearing officer issues his or her order, payment
16 should be -- again, I don't think there is any expectation it's
17 instantaneous, but it should be immediate, and I will define
18 immediate within a few days. This shouldn't be seven, ten
19 business days or beyond.

20 THE COURT: And you get that from where, that
21 guideline?

22 MR. ALBERT: A little bit of common sense. There is
23 no requirement with respect to when the implementation should
24 be done. Some of the hearing officers will put in their order
25 by X date you must do such and such.

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1 THE COURT: Hearing officers will put in by such and
2 such payment must be made?

3 MR. ALBERT: Correct. It's not uncommon, but I think
4 it's more uncommon than common that that be done. Typically
5 what a hearing officer might do with respect to a date is to
6 direct the DOE, if there is going to be sort of a remand back
7 to the district to address an issue that wasn't fully developed
8 at the administrative hearing, to require the district to
9 reconvene their committee on special education within two
10 weeks, 30 days, whatever the time period is.

11 THE COURT: So I go back to my question. Do you know
12 whether the city is treating iBRAIN differently than any other
13 such provider, like iHOPE or any other school with which you no
14 doubt are familiar?

15 MR. ALBERT: I don't know for a fact, and it would be
16 difficult for me to say cavalierly in open court, yes, they
17 treat them differently. We suspect they do.

18 THE COURT: Based on?

19 MR. ALBERT: Based on the fact that it's a small bar
20 that deals with these kinds of cases, and I am not aware of any
21 other law firm or lawyers who practice in this area who have
22 had the number of, I will say, issues or concerns about the
23 prompt payment, the prompt, really, compliance with impartial
24 hearing officer orders. So I can't present to the Court, yes,
25 I know for a fact.

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1 THE COURT: Again, I believe the representation was
2 made that the city generally is able to pay these things off
3 within 35 days.

4 Now, you mentioned common sense earlier. What should
5 I use as a guideline? 35 days from the bureaucracy of the City
6 of New York, New York City Board of Education, 35 days to me
7 seems fairly reasonable. Why should I find otherwise?

8 MR. ALBERT: Well, for a couple of things. For some
9 of these orders it's beyond 35 days. Number two, some of the
10 payments are done on a piecemeal fashion.

11 THE COURT: What do you mean by that?

12 MR. ALBERT: For a pendency order, a pendency order
13 might have several components. It might have a component for
14 tuition. There might be a component for nursing services.
15 There might be a component for transportation services. They
16 are all required by DOE's rules to have separate invoices and
17 separate affidavits in support of the payment.

18 When an impartial hearing officer directs that the
19 student's pendency is at X location, and orders the DOE to fund
20 that pendency, an impartial hearing officer never says, Oh, and
21 you need to support it by whatever process the school district
22 has. This is an administrative order under federal law and
23 under state law.

24 THE COURT: So are you suggesting that where an
25 impartial hearing officer directs the DOE to provide not only

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1 the tuition, but nursing and transportation for a child, that
2 the city simply pay over an amount without requiring that the
3 providers provide adequate invoices for those services? Is
4 that a business practice you want the city to adopt?

5 MR. ALBERT: No. Typically, during these
6 administrative hearings, there is a submission of those things,
7 an affidavit of a tuition payment, usually a copy of an
8 enrollment agreement, a transportation agreement. So this
9 documentation already exists and ordinarily assists the
10 impartial hearing officer to do that.

11 Now, again, this is just for pendency. In other
12 words, this is a payment so that the student is allowed to stay
13 where they are to continue to receive whatever services they
14 were getting, until such time that there is a full adjudication
15 of the student's rights. So this isn't a blank check and say,
16 for the next ten years you have a free ride. That's not the
17 case.

18 THE COURT: Let me ask you this. Is it generally the
19 case -- again, across the board, not just at iBRAIN but with
20 respect to every child who is in an IEP, with respect to every
21 child that the Board of Education is required to provide these
22 services to -- that they require of every school and of every
23 provider that an invoice be submitted before payment is made?

24 MR. ALBERT: I don't know what the DOE's requirements
25 are with respect to others, but for pendency and for the

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1 provision of special education, it's done on an annual basis.
2 So it's conceivable and for some of our students, if you look
3 at some of the papers, there are multiple cases for consecutive
4 years. They can evolve into, you know, one year rolls into
5 another year. So pendency can go from, let's say the '17-'18
6 school year, it can continue into the '18-'19 school year if
7 the substantive part of that determination has not been
8 resolved.

9 So to answer your question, yes, it could encompass
10 two years, but it's rare that that happens and it's rare that
11 it would ever go beyond that.

12 THE COURT: As far as I know, this case is about
13 payment. My question was whether every other provider, aside
14 from iBRAIN, is absolved of the obligation to submit an invoice
15 for payment? Do you know?

16 MR. ALBERT: I would have no way of knowing that.

17 THE COURT: Do you have clients who attend other
18 schools besides iBRAIN over the course of your career?

19 MR. ALBERT: Not in New York City, no.

20 THE COURT: Where? Do you have clients in other
21 cities that are receiving these types of IDEA benefits?

22 MR. ALBERT: Currently the Brain Injury Rights Group
23 is only dealing with students who attend who are residents of
24 New York City. So I would say, only with respect to this group
25 and others, it's a New York City centered problem. Those

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1 issues typically, in my experience, don't exist elsewhere.

2 THE COURT: Go ahead. You can finish your
3 presentation.

4 MR. ALBERT: With respect to that, as your Honor
5 pointed out, DOE has essentially admitted that there are
6 payments owed. And under those circumstances, again, it's not
7 discretionary on their part. If a hearing officer issues an
8 order of pendency, they are supposed to pay.

9 THE COURT: The representation is that they are
10 paying.

11 MR. ALBERT: Well, pieces of it, and in some cases not
12 at all.

13 THE COURT: OK. Anything else?

14 MR. ALBERT: That's it. Thank you.

15 THE COURT: Mr. Rauchberg.

16 You can remain seated.

17 MR. RAUCHBERG: Your Honor, I can provide some clarity
18 for some of the issues the Court was posing to plaintiffs'
19 counsel.

20 For one thing, and I want to answer this very clearly,
21 there is no different treatment for the students who attend
22 iBRAIN as compared to students who attend other schools or who
23 remain within the public system. No difference at all.

24 As I think your Honor suspects, we require invoices in
25 every instance, and even as school years pass, if a new school

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1 begins and students are continuing to receive services, even
2 from the same providers or even at the same school, we continue
3 to require invoices. We like to see proof of attendance, the
4 rates of services, etc. And that is a practice for every
5 student, every provider, etc.

6 And there is an interesting thing that came up with
7 the Court's discussion with plaintiffs. Because you asked if
8 the plaintiffs feel that they are being treated differently, if
9 iBRAIN students are treated differently. And one of the
10 exchanges I had with plaintiffs' counsel as we were leading up
11 to this and I was trying to convey to plaintiffs' counsel and
12 Mr. Albert's colleague, that there was no need for a federal
13 action here, there was no need to seek federal enforcement
14 because, as your Honor has noted, there is not a dispute, at
15 least in the instance of five of six students, because payments
16 were going to be made. And one of the things I was told was,
17 make these payments by this date or we will go to court. And I
18 asked, Why should we treat these students differently? Why
19 should we treat the students that attend iBRAIN differently?
20 Why should we pay their invoices before we pay the invoices of
21 the thousands of other students in special education? That
22 question was never answered, of course, because it has no fair
23 answer.

24 Plaintiffs are asking for special treatment here.
25 They are not here because they are being treated unfairly or

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1 differently from other students; they seem to expect that they
2 should get different treatment. And as your Honor noted, one
3 of the things that is explicitly requested in the papers is
4 plaintiffs want immediate payment of invoices.

5 Now, it seems that Mr. Albert kind of backed away from
6 that a little bit, and I do appreciate that. Because I see
7 nothing in the case law that says that payments must be made
8 immediately, or instantaneously, or anything of the sort. And
9 at some point in time we have to have some common sense applied
10 here and recognition, as Judge Hellerstein noted in a very
11 similar case that was brought by the same advocates on behalf
12 of some of the same plaintiffs over the summer seeking, again,
13 immediate payments. And Judge Hellerstein observed, it takes
14 time to process an invoice and that is to be expected. I think
15 that was a very straightforward response to their application,
16 and I think it applies here as well.

17 With the five students who we don't have any
18 disagreement about, and we set this forth very clearly before
19 they came to court, for those five students the payments will
20 be made. And by my calculations, based on what Ms. Kapoor from
21 the DOE represented -- she runs the impartial hearing
22 implementation unit and her declaration was with our papers
23 that we put in yesterday -- she pointed out what payments she
24 has made. And the only thing that I see that has not been paid
25 are in instances when we don't have invoices. In every other

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1 example, whether it's transportation or tuition, the payments
2 have either been made or they have been processed.

3 Now, there is a lag. When we process a payment the
4 money doesn't instantly appear at the vendor. It does take
5 seven to ten days after the payment is populated. And you know
6 what, Judge, sometimes when the possessing happens at the DOE,
7 it doesn't populate for another business day. That happens
8 sometimes as well. And in those instances it's probably
9 correct that it's actually eight to eleven business days later
10 that the payment is received. That sort of thing happens.

11 I would also like to note that this, too, is the way
12 we pay everybody. This is the system we use for everyone when
13 the obligation is imposed by an impartial hearing.

14 Now, again, plaintiffs say they wonder if they are
15 getting treated differently. I point out, if they are hearing
16 from other advocates that they go about this differently, it's
17 because not a single other advocate that I'm aware of thinks
18 they need a federal court to issue a preliminary injunction to
19 force the department to make these payments, because it isn't
20 necessary. And because I work for the DOE so frequently, I am
21 in contact with many attorneys at the parents' bar, and what
22 they do is they reach out to me and they say, a payment hasn't
23 been made here, can you look into it? I do. Sometimes it's an
24 oversight and we correct it, and we correct it through that
25 exchange and a separate federal action is never necessary,

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1 except for these particular advocates.

2 I do not think the Court needs to issue a ruling here
3 because there is no need for this action at all. This is the
4 process that we are applying fairly. And I appreciate what the
5 Court noted about our process that we make these payments
6 within 35 days. And I can tell you from my own experience as
7 well, Judge, nothing happens faster with my clients when the
8 comptroller issues a check. We follow the CPLR and we do that
9 within 90 days. These payments are made quickly, in part,
10 because we recognize these are services for special education
11 students, the payments should be made promptly, and we want to
12 make sure there is no interruption of services.

13 Here, there is no allegation that any services have
14 been interrupted. There is no allegation that any services
15 have been deprived of any student. Even a student where we
16 have a disagreement, there is no allegation that that student
17 isn't receiving the services that she is entitled to, or
18 allegedly entitled to. We have a disagreement about it, but
19 there is no dispute that she is getting the services, and there
20 is no allegation that she is at risk of losing those services
21 at any time.

22 Now, if the plaintiffs think that our position or the
23 department's position at the impartial hearing is unreasonable
24 or indefensible or untenable, well, that is the business we
25 have chosen. The hearing officer will rule on that and we will

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1 adhere to that ruling. That is the process. And I think it's
2 actually operating expeditiously in the instance of these
3 students. And so I vehemently object to the suggestion that
4 these students or the students who attend this school receive
5 anything but the same fair treatment that all the students who
6 are our responsibility are receiving.

7 I also oppose the idea that a federal action was
8 needed in this at all or that we need any injunctive relief
9 from the Court. Because in this instance the facts are what is
10 most important here, and the facts are that we have made these
11 payments, and to the extent that we have not received invoices,
12 we will process those in the usual course of business. And the
13 law requires nothing more.

14 THE COURT: What about with respect to Kate A, the
15 sixth child?

16 MR. RAUCHBERG: With Kate A, as I said a moment ago,
17 we do have a disagreement about what constitutes pendency.
18 There the student is receiving the services. I think that is
19 very important. And there is no allegation that she will not
20 receive the services in the future. To the extent that there
21 is a dispute, it's already been briefed before an impartial
22 hearing officer who is assigned to the underlying hearing.
23 There is a date on the calendar for next week. It may be that
24 the impartial hearing officer will rule on the papers, or it
25 may be that there will be some argument and a ruling

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1 thereafter.

2 Now, the parties have a right to appeal to a state
3 review officer. That process is available. But I suspect that
4 this will be resolved very soon, and we will either have a
5 ruling that says pendency is one thing or it's another. By the
6 way, the litigation on the merits of their claim, that they are
7 entitled to payment for the '19-'20 school year at iBRAIN,
8 well, that will continue, and they will make their case and
9 they will either prevail or they won't. Again, that is the
10 system. It is ponderous, the courts have observed that. But
11 it's moving along for the student. And because the student is
12 receiving the services, I think there is no risk for her or any
13 potential of harm to her. There I feel strongly about that.

14 THE COURT: Mr. Albert, do you wish to respond?

15 MR. ALBERT: Yes, just briefly.

16 We are not asking for special treatment. What we are
17 asking ask is for compliance. We are asking for compliance
18 with impartial hearing officer orders that have been ordered
19 under a federal law which provides for an automatic injunction;
20 not an injunction that takes place 30 days later, 35 days
21 later, 20 days later, it's an automatic injunction. That's
22 number one.

23 Number two, these are disabled children who attend the
24 school. These aren't vendors who do business with New York
25 City. And to treat the students as simple vendors almost with

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1 New York City misses the mark. These are obligations that
2 don't arise by contract. These are obligations that arise by
3 federal law.

4 THE COURT: Mr. Albert, you are suggesting by that
5 argument that the students are being prevented from receiving
6 the services that they require because they are not getting
7 paid as fast as you would like. But that is, in fact, not the
8 case, isn't it? The dispute here is not between the children
9 and the Department of Education, it's between the vendors and
10 the Department of Education.

11 MR. ALBERT: Not yet. Right now there is no claim
12 that the students have been threatened with being disenrolled
13 from the schools. They are all attending the school; they are
14 all receiving their services. However, in pendency cases there
15 is case law that says that harm is presumed. There is no need
16 to show that there is irreparable harm in these cases. The
17 fact that their pendency rights under a federal statute in and
18 of itself not only provides standing from just a legal point of
19 view, but gives them the right, the automatic right for that
20 relief. This isn't, do they merit it, do they warrant it?
21 It's an automatic right.

22 Again, pendency is somewhat different than what Mr.
23 Rauchberg was talking about, in terms of an impartial hearing
24 officer rendering a decision regarding whether or not the
25 student's placement and program was appropriate. That's a

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1 different issue. But during that period of time there needs to
2 be stability for that student, and pendency includes not only
3 the provision of services but the payment for those services.
4 And at some point the student's school may not be so lenient
5 with respect to not receiving payment.

6 THE COURT: I don't know whether it's in this case or
7 in a related case, but am I correct that the agreement between
8 the parents and the iBRAIN school provides that the child will
9 remain in the school so long as the pendency issue is pending?

10 MR. ALBERT: Until such time it see essentially gets
11 resolved. Let's put it that way. I don't recall the specific
12 contractual language, but I believe you're correct, your Honor.
13 That's the essence.

14 THE COURT: Mr. Rauchberg?

15 MR. RAUCHBERG: I have not seen the contract for
16 '19-'20. I did see the language in the '18-'19 school year.
17 My recollection is it wasn't the issue of pendency that needed
18 to be resolved. I thought it was the entire litigation. So as
19 long as the parent was maintaining the case, either before a
20 hearing officer or then appealing to the state review officer
21 or then appealing to federal or state court, as they are
22 entitled to do, they were entitled to remain at the school.
23 That is my recollection, but I would take that with a grain of
24 salt.

25 THE COURT: OK. Mr. Albert, anything else?

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1 MR. ALBERT: I have nothing further.

2 THE COURT: Why don't you folks give me five minutes
3 and I will be right back out.

4 (Recess)

5 THE COURT: The application for a preliminary
6 injunction is denied. It seems to me that at its core the
7 plaintiffs' argument is that the statute provides for an
8 automatic injunction with respect to pendency, and that
9 therefore means that payment for that pendency has to be made
10 immediately, or as soon as possible, or using some other
11 guideline undefined either in the statute or in case law or in
12 our common experience.

13 I do not find that plaintiffs' arguments are
14 meritorious that payment is required within some particular
15 amount of time. All that pendency requires is that the child's
16 educational experience not be disrupted. There is no dispute
17 here that the children's educational experience is not being
18 disrupted, and there is no credible evidence before me to
19 suggest that the city is not abiding by its obligation to fund
20 those students whose pendency has been determined. In fact,
21 the evidence before me is exactly the opposite, which is to say
22 that the city has represented, both in arguments before me and
23 in affidavits that were submitted in connection with their
24 papers, that the city is paying for the children's education;
25 it is processing the invoices that it receives from the vendors

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1 in the ordinary course; it is not treating these children or
2 these vendors any differently than it treats any other children
3 who are receiving IDEA benefits or any other vendors who are
4 providing children who are receiving IDEA benefits.

5 Clearly, to my mind, there is no conflict here. The
6 city is abiding by its obligations. I am not going to require
7 them to do anything more for iBRAIN students than they do for
8 any other IDEA beneficiary. And I find that, based on what I
9 have been told, that the amount of time within which they
10 actually are paying these vendors is not affecting the
11 children's rights in any way that creates a violation of the
12 IDEA, at least not on the record before me.

13 So with all of that, the application is denied.

14 What should we do next, Mr. Albert, with respect to
15 this matter?

16 MR. ALBERT: With all due respect, your Honor, while
17 we are certainly disappointed in the determination, we would
18 ask if you could reconsider this and perhaps reconvene, if not
19 oral argument, perhaps a status conference in a couple of
20 weeks. In a couple of weeks, if these payments have been made,
21 then we would certainly concur that the DOE has abided by its
22 obligations. But at this point it's difficult for us to sit
23 idly by and say that the DOE can impose whatever obligations
24 and requirements and timeline to make a payment on behalf of a
25 pendency order.

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1 When the pendency order is -- it even goes before the
2 pendency order. Pendency begins when the due process complaint
3 is filed. These due process complaints are filed in July,
4 usually at least, typically, approximately when the academic
5 year begins, which is a July 1st date. That's the trigger for
6 pendency, the due process complaint. The impartial hearing
7 officer pendency order is when an impartial hearing officer is
8 appointed, accepts the case, is able to schedule a hearing,
9 which is all within the control of DOE. When the hearing
10 officer then issues his or her pendency order, we have already
11 gone two months, in some respects three months beyond the date
12 when that due process complaint started, the time when pendency
13 was initiated, when it was triggered.

14 Again, the DOE really -- I understand that they can't
15 issue payment instantaneous, and again, to reiterate, we are
16 not asking for instantaneous payments, but here we are in the
17 middle of October and there is at least five parents who
18 started their process in July and there has been no resolution.

19 THE COURT: You keep saying that and the city keeps
20 saying, no, we have paid them, or they are being processed, and
21 you have no information to contradict that.

22 MR. ALBERT: I do, your Honor. If you look at the
23 affidavits submitted by the DOE in this case, there is a
24 concession that, yes, we have not paid everything.

25 THE COURT: Right. But they are being processed, to

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1 the extent that they are not being disputed.

2 MR. ALBERT: With the exception of that one student,
3 we would agree. But I don't believe that that's an accurate
4 assessment of all the elements for the other five.

5 THE COURT: Look, Mr. Albert, I am not going to
6 reconsider the decision that I made just about 45 seconds ago.
7 If you believe that there is an adequate basis for
8 reconsideration, then you should follow the local rules for a
9 motion to reconsider.

10 MR. ALBERT: Thank you, your Honor.

11 THE COURT: Anything else?

12 MR. ALBERT: None from plaintiff.

13 THE COURT: Mr. Rauchberg, procedurally, what should
14 we do with this matter? We can come back in a few weeks for an
15 initial pretrial.

16 MR. RAUCHBERG: It sounds like, even if we were to
17 update the Court or have a conference or a status letter, I am
18 not sure I am hearing that, if the payments are made, that
19 would lead to a withdrawal of the action. Because, obviously,
20 that makes a lot of sense to me, and I would certainly support
21 that. If I am hearing correctly, however, that that is
22 unlikely, then what I would like to do -- I am happy to have a
23 conference, but I think I would like to take some time to
24 consider a 12(b)(6) motion, if that's going to be necessary.
25 And if we are to do that, it seems this would be the

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1 appropriate time to ask the Court -- we were served a week ago
2 with the papers. I would like a little more time to prepare a
3 response. We can set that schedule now.

4 THE COURT: OK.

5 MR. RAUCHBERG: That would be fine with me.

6 THE COURT: Schedule for what, for a premotion
7 conference or for a motion to dismiss?

8 MR. RAUCHBERG: Your Honor, I am sorry that I didn't
9 look at your motion rules before coming in here today.

10 THE COURT: I do have a premotion conference
11 requirement.

12 MR. RAUCHBERG: If this is going to be necessary, and
13 again, it sounds like it is, then I would say, if we can put in
14 our letter maybe three weeks from today.

15 THE COURT: OK.

16 MR. RAUCHBERG: Then plaintiffs would have their
17 opportunity to oppose, and then we would be happy to conference
18 on the issue thereafter at the Court's convenience.

19 THE COURT: In the meantime I encourage the parties to
20 have a discussion about what the facts are here and whether
21 this action is, strictly speaking, necessary going forward, but
22 I will leave that up to you all.

23 So three weeks from today, Mr. Rauchberg.

24 We are adjourned.

25 (Adjourned)